Supreme Court, U.S.
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No. 93-1278

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

COUNTY OF BERKS, PENNSYLVANIA, *et al.*,
Petitioners,

v.

MERRY J. MURTAGH, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania, Middle District

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In their Brief in Opposition, respondents maintain that the Court lacks jurisdiction to entertain the Petition for a Writ of Certiorari filed in this matter because the Supreme Court of Pennsylvania's judgment entered November 10, 1993 is said not to constitute a final judgment under 28 U.S.C. § 1257(a).

Petitioners submit this Reply to demonstrate that the Court's decisions construing 28 U.S.C. § 1257 establish that the Supreme Court of Pennsylvania's judgment entered November 10, 1993 does indeed qualify as a final judgment.

Accordingly, because the Brief in Opposition fails to undermine the assertion of petitioners and *amici* that the question presented is *both* a question of federal law as to which state courts of last resort are in direct conflict *and* an important question of federal law that has not been, but should be, resolved by the Court, petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

ARGUMENT

The Judgment Of The Supreme Court Of Pennsylvania Is "Final" Within The Meaning Of 28 U.S.C. § 1257

Respondents contend that the judgment sought to be reviewed does not constitute a final judgment for purposes of 28 U.S.C. § 1257(a). To understand why respondents are mistaken, it is necessary to revisit the procedural history of this case.

As is explained in more detail in the Statement of the Case, *see* Petition at 6-9, the Commonwealth Court of Pennsylvania, Pennsylvania's intermediate appellate court, dismissed respondents' 42 U.S.C. § 1983 suit challenging the constitutionality of the system of real estate taxation in Berks County, Pennsylvania because respondents had failed to pursue the plain, adequate and complete administrative and judicial remedies available

to them under state law. *See Greenwich Township v. Murtagh,* 144 Pa. Commw. 624, 636-37, 601 A.2d 1352, 1358-59 (1992) (reprinted in Appendix (App.) at 31a).

In so ruling, the Commonwealth Court rejected respondents' assertion that the Supremacy Clause of the United States Constitution, U.S. CONST. Art. VI, cl. 2, requires state courts to entertain real estate tax assessment challenges brought under 42 U.S.C. § 1983 regardless of whether plain, adequate and complete state remedies have been pursued. *See Greenwich Township,* 144 Pa. Commw. at 632, 601 A.2d at 1356 (reprinted in App. at 26a-27a).

On appeal, the Supreme Court of Pennsylvania reversed. Pennsylvania's highest court ruled that the Supremacy Clause *requires* state courts to entertain tax challenges brought pursuant to 42 U.S.C. § 1983 even where plaintiffs have not exhausted the plain, adequate and complete remedies available to them under state law. *See Murtagh v. County of Berks,* 634 A.2d 179, 185 (Pa. 1993) (reprinted in App. at 12a-13a). The Supreme Court of Pennsylvania's ruling on the question presented is the final word that will be spoken by the Pennsylvania courts in this suit concerning whether the Supremacy Clause requires state courts to hear 42 U.S.C. § 1983 tax challenges regardless of whether plaintiffs have pursued the plain, adequate and complete remedies available to them under state law.

The government entities who have joined as petitioners herein believe that the vital policy of federal noninterference in matters of state and local taxation dictates that they should not be subject to respondents' state court 42 U.S.C. § 1983 tax challenge because respondents have failed to pursue the plain, adequate and complete administrative and judicial remedies available to them under Pennsylvania law. This strong federal policy of noninterference in matters of state and local taxation is demonstrated by the fact that if respondents' suit had been filed in federal court, the suit would have been dismissed in favor of the plain, adequate and

complete remedies existing under state law. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100, 116 (1981); *Sunderland Properties, Inc. v. County of Berks,* 750 F. Supp. 704 (E.D. Pa. 1990) (dismissing identical challenge to Berks County's system of property taxation in favor of the plain, adequate and complete administrative and judicial remedies existing under Pennsylvania law).

In *McNary,* the Court held that Congress did not intend to subject state and local governments to 42 U.S.C. § 1983 tax challenges brought in *federal* courts where the plaintiffs have access to plain, adequate and complete remedies under state law. *See McNary,* 454 U.S. at 116. Petitioners ask this Court to recognize that Congress likewise did not intend to subject state and local governments to 42 U.S.C. § 1983 tax challenges brought in *state* courts where the plaintiffs have access to plain, adequate and complete remedies under state law.

If respondents' jurisdictional argument were correct, petitioners would not be able to secure review of the important question presented until after respondents' 42 U.S.C. § 1983 tax challenge was resolved on its merits. In that event, petitioners' eventual victory, establishing, after this suit is litigated to a judgment on its merits, that petitioners *should not have been* subject to this state court tax challenge arising under 42 U.S.C. § 1983, would be a hollow victory indeed.

Fortunately, the final judgment requirement contained in 28 U.S.C. § 1257 does not compel such a harsh result. A review of the Court's decisions construing 28 U.S.C. § 1257 establishes that the Court has repeatedly refused to adopt the rigid view of finality that respondents espouse in their Brief in Opposition.

As far back as *Forgay v. Conrad,* 47 U.S. (6 How.) 201, 203 (1848), the Court noted that "this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more

liberal, and, as we think, more reasonable construction, and one more consonant to the intention of the legislature."

More recently, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 486 (1975), the Court examined the "pragmatic approach that we have followed in the past in determining finality." In *Cox,* the Court described the relevant category of cases, identified by the Court as the fourth category, in which the final judgment requirement has been pragmatically applied:

> there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83.

The Court in *Cox* viewed its earlier decision in *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555 (1963), as falling into this category of cases considered final for purposes of 28 U.S.C. § 1257. In *Langdeau,* the question presented was whether federal law prohibited two national banks from being sued in a state court located in Travis County, Texas and instead required that the banks be sued in a state court located in Dallas County, Texas. *See id.* at 556-57. In holding that a final judgment existed under 28 U.S.C. § 1257 even though

the Supreme Court of Texas had only adjudicated the question of proper venue, this Court explained:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may be all for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. Accordingly, we note our jurisdiction to hear these appeals under § 1257(2) and turn now to the question of whether appellants may be sued in Travis County court.

Langdeau, 371 U.S. at 558.

Similarly, in *Hudson Distribs., Inc. v. Eli Lilly & Co.,* 377 U.S. 386, 389 n.4 (1964) (emphasis added), the Court held, citing *Langdeau*:

> The fact that separate and unresolved issues are pending in the Ohio courts and subject to "further proceedings" therein on the cross-petition *does not* render the judgment of the Ohio Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. § 1257.

In so ruling, the Court specifically rejected a dissent that advanced the argument now made by respondents:

> One would have thought that the judgments reviewed here were paradigms of the nonfinal judgment. Assuming that the federal question which the Court decides was really passed on by the Ohio Supreme Court, it is clear nonetheless that this litigation is still in its early stages. No rights have yet been established; no liabilities have been incurred.

> The Court acknowledges that federal questions, involving unresolved issues of fact and interpretations of the Ohio Act, must still be decided by the Ohio courts.

Hudson Distribs., 377 U.S. at 398-99 (Harlan, J., dissenting) (footnote omitted).

Further supporting this Court's exercise of jurisdiction over the judgment of the Supreme Court of Pennsylvania is *Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985), where the Court wrote, citing *Langdeau*: "[s]imilarly, we have held that state-court decisions rejecting a party's federal law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257."

Here, petitioners' argument that they should not be subject to respondents' 42 U.S.C. § 1983 tax challenge in state court plainly is a contention that petitioners are "not subject to suit before a particular tribunal." *Mitchell v. Forsyth*, 472 U.S. at 525 n.8.

Respondents' reliance on the Court's *per curiam* opinion in *Flynt v. Ohio*, 451 U.S. 619 (1981), is misplaced. There, the Court explained that "[t]he cases which the *Cox* opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in state courts." *Id.* at 622. In *Flynt*, the Court held that no federal policy would be "seriously erode[d]" by delaying review until the state court proceedings had run their course. *Id.*

Here, by contrast, permitting respondents' 42 U.S.C. § 1983 tax challenge to go forward on the merits would seriously erode the important and longstanding federal policy of avoiding federal intrusion into matters of state and local taxation.

This important policy was recognized in *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871), where the Court wrote:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Similarly, in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943), the Court wrote:

> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially when the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax.

See also Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976) (emphasis added) ("As the Court has frequently had occasion to note, [28 U.S.C. § 1341] has its roots in equity practice, in principles of federalism, and *in recognition of the imperative need of a State to administer its own fiscal operations.*").

In *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 527 (1981), the Court stated that "the reasons supporting federal noninterference [with state taxation] are just as compelling today as they were in 1937." The Court also noted that "[t]he property tax is by far the most important source of tax revenue for cities and counties." *Id.*

Finally, in *McNary,* 454 U.S. at 116, the Court held that the federal policy of noninterference in matters of state and local taxation was *so important* as to overcome

the competing important federal policy favoring ready access to federal courts for 42 U.S.C. § 1983 actions.

As the Supreme Court of Wisconsin explained in *Hogan v. Musolf,* 163 Wis. 2d 1, 18, 471 N.W.2d 216, 222 (1991), *cert. denied,* 112 S. Ct. 867 (1992):

> The Supreme Court's primary interest in *McNary* was to avoid interference with state taxing practices by permitting states to have the opportunity to apply their remedies and procedures in tax matters before federal remedies are sought by a sec. 1983 action. We understand *McNary* as indicating that the Court is equally concerned that tax challenges be conducted according to state remedies as it is that they be conducted in a state forum. It would be no less disruptive of the state's internal economy and administrative tax procedures for a state court to act under sec. 1983 and suspend the usual tax collection and refund procedures of the state than it would be for a federal court to do so. In addition, regardless of which court interferes with the state's fiscal operations, tax officials would be improperly denied the opportunity to rectify any alleged impropriety before being subject to a sec. 1983 action. Accordingly, we conclude that the policies which motivated the Court's decision in *McNary* are equally applicable to sec. 1983 actions in state court.

Here, the only reason petitioners will be subject to respondents' state court 42 U.S.C. § 1983 tax challenge is because the Supreme Court of Pennsylvania has held that result to be compelled by the Supremacy Clause of the United States Constitution. If that holding is erroneous, as petitioners believe, it should be corrected now, before infliction of the disruptive harm that the important federal policy of noninterference in matters of state and local taxation is meant to prevent.

In sum, the judgment that the Supreme Court of Pennsylvania entered in this matter on November 10, 1993 constitutes a final judgment for purposes of 28

U.S.C. § 1257(a) because the judgment falls within the fourth category of final judgments described in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. at 482-85.

Specifically, this case is in all relevant respects indistinguishable from *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. at 556-58, where the Court ruled that a judgment rejecting the assertion that federal law required a claim to be heard in one forum instead of another constituted a final judgment for purposes of 28 U.S.C. § 1257.

It cannot be disputed that the right sought to be vindicated in the Petition is important and would be seriously eroded if relief were to be withheld and respondents' 42 U.S.C. § 1983 action were permitted to proceed forward to a judgment on its merits. It is also beyond dispute that a decision reversing the judgment of the Supreme Court of Pennsylvania would bring this suit to an end.[1]

For these reasons, the judgment of the Supreme Court of Pennsylvania in this matter constitutes a final judgment for purposes of 28 U.S.C. § 1257(a).

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1. While the Supreme Court of Pennsylvania did not reach the question of whether Pennsylvania's current statutory remedies for addressing challenges to property tax assessment practices are plain, adequate and complete, *see Murtagh,* 634 A.2d at 182 n.11 (reprinted in App. at 7a), every other court to address the merits of this issue has answered that question in the affirmative. *See Behe v. Chester County Bd. of Assessment Appeals,* 952 F.2d 66, 68 (3d Cir. 1991); *Garrett v. Bamford,* 582 F.2d 810, 815, 817 (3d Cir. 1978); *Sunderland Properties,* 750 F.Supp. at 710, *Greenwich Township,* 144 Pa. Commw. at 636-37, 601 A.2d at 1358-59 (reprinted in App. at 31a).

CONCLUSION

Because respondents are wrong in contending that the judgment of the Supreme Court of Pennsylvania is not "final," and because respondents have failed to assert any other persuasive reason why this Court should not resolve the direct conflict among state courts of last resort regarding the important question of federal law presented, petitioners respectfully pray that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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